STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 4, 2005
v	No. 253677 Wayne Circuit Court
KEITH GIST, Defendant-Appellant.	LC No. 03-011417-01

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for third-degree home invasion, MCL 750.110a, and unlawful driving away of an automobile (UDAA), MCL 750.413. The trial court sentenced defendant to concurrent prison terms of twenty-three months to five years for each conviction. We affirm.

Defendant argues that there was insufficient evidence to support his convictions of third-degree home invasion and UDAA. We disagree. When reviewing a sufficiency of the evidence challenge, we "view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). All conflicting evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

MCL 750.110a(4) provides that a person is guilty of third-degree home invasion who "[b]reaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or . . . enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor." Defendant's argument on this crime rests on his testimony that he did not possess a key to the house. However, defendant never testified that he used a key to enter the house on the day in issue. Conversely, Brooks testified that the lock that secured the bars to her bedroom window was gone. In any event, entry to a home with a key is not necessarily permissive where other evidence shows a lack of permission. *People v Wynn*, 386 Mich 627, 631; 194 NW2d 354 (1972). The complainant testified that she and defendant were divorced, that he had never lived in the home, that he had previously only entered by invitation or in her presence, and that she had not given permission to enter the home on the day in question. When this evidence is viewed in the light most favorable to the prosecution, a

reasonable trier of fact could find that defendant did not have permission to enter the home, notwithstanding his alleged possession of a key. *Bulmer*, *supra* at 36.

However, conviction of home invasion in the third degree also requires either that the nonpermissive entry be "with intent to commit a misdemeanor in the dwelling" or that defendant actually committed a misdemeanor "any time while he or she is entering, present in, or exiting the dwelling." MCL 750.110a(4)(a). Regarding the former, a finder of fact may infer a defendant's intent from circumstantial evidence. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). The evidence indicates that defendant entered the house without permission or announcement and went to a part of the house where he was unlikely to be discovered immediately, carrying a two and a half foot metal pole. The evidence further indicates that defendant took the pole with him. A reasonable finder of fact could infer that defendant intended to commit a misdemeanor assault when he entered the home.

Regarding the latter, complainant and a friend both testified that defendant hit the friend with a 2-foot pole while in complainant's home. One who assaults or batters another is guilty of a misdemeanor "if no other punishment is prescribed by law." MCL 750.81(1). Battery is defined as an intentional, harmful or offensive touching of another person. *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). Defendant's intentional and harmful act of hitting the friend with a 2-foot pole qualifies as a misdemeanor. A rational trier of fact could have found that defendant entered complainant's home without permission and, while inside, committed the misdemeanor of criminal battery. Thus, the evidence is sufficient to support a conviction of home invasion in the third degree under either theory.

Defendant finally argues that the prosecution failed to prove UDAA beyond a reasonable doubt because the evidence did not show that he drove away in complainant's vehicle without permission. We disagree. A person commits UDAA, MCL 750.413, when he takes the vehicle of another "without authority or permission." *People v Hendricks*, 200 Mich App 68, 70; 503 NW2d 689 (1993). Defendant again argues that his possession of a key (this time to the vehicle) is dispositive. But the complainant testified that she had retrieved from defendant her keys to this vehicle after the divorce and had not subsequently given defendant permission to use the vehicle. We resolve conflicting testimony in the prosecution's favor. *Terry*, *supra* at 452. Moreover, a lack of permission could be inferred from the manner in which defendant drove away after the police were summoned. Viewing the evidence in the light most favorable to the prosecution, *Bulmer*, *supra* at 36, we conclude that a rational trier of fact could have found defendant guilty of UDAA.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey